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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.
No. 263

SHULIN WIXMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

On petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for the National Lawyers Guild as Amicus Curiae in Support of the Petition for a Writ of Certiorari.

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Preliminary Statement.

The National Lawyers Guild respectfully urges the Court to grant the petition for certiorari which has been filed in this case. This brief is filed pursuant to the consent of the parties.

The petition presents substantial constitutional issues of national importance, affecting the fundamental civil rights of a large number of persons. The specific questions involved relate to the provisions of Section 307(a) of the Nationality Act of 1940 (54 Stat. 1142, 8 U. S. C. 707(a)), which provides:

> "No person . . . shall be naturalized unless such petitioner . . . during all the periods referred to in this subsection has been and still is a person . . .

attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

With respect to the wisdom or constitutionality of the other provisions of this section and other sections of the Nationality Act of 1940 requiring persons to be of certain races or colors, to have resided in the United States for a certain period of time, to be of good moral character and other requirements, we are not here concerned, for there was no finding that petitioner did not come within these provisions. Our concern is with the interpretation given to the meaning of attachment to the principles of the Constitution and to the state of being well disposed to the good order and happiness of the United States, as provided by the naturalization law, by the District Court for the Southern District of California, Central Division, and affirmed by the United States Circuit Court of Appeals for the Ninth Circuit in this case.

The National Lawyers Guild has long been interested in protecting and clarifying the rights of all people. In these turbulent times, it is of utmost importance that the basic principles with respect to citizenship within these United States be clearly understood by all who are citizens, or who seek to become citizens. This is particularly true when such grave and fundamental questions are raised as with respect to the granting or denial of citizenship on the basis of a finding that an applicant was not attached to the principles of the Constitution and was not well disposed to the good order and happiness of the United States. The test to be used in making such a finding under not only naturalization provisions, but under the provisions of any law, regulation or executive order should be a clear and concise one, readily understood by

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not only our citizens and our resident aliens, but those who look to the shores of the United States as a place of refuge from tyrany and oppression, or who look to our form of government and the basic principles by which the citizens of the United States govern themselves as an example for the establishment of order, peace and happiness throughout the world.

Because the test used to reach the finding in this case did not include a consideration of decisions in other cases by this Court on the interpretation to be given to the phrases "attached to the principles of the Constitution" and "well disposed to the good order and happiness of the United States" and did not include a consideration of the aspects of freedom of speech within the meaning of the first amendment to the United States Constitution within the "clear and present danger" rule, *amicus curiae* urges that the petition be granted in this case. Specifically, we urge that the petition be granted in this case so that the Court may consider three broad, basic aspects of the problem of the basis for the granting of citizenship, which we submit were erroneously considered by the Circuit Court:

1. Adherence to the principles of the Constitution of the United States has the same meaning for those who seek to become citizens as for those who are citizens.

2. A belief in collectivism does not violate the principles of the Constitution of the United States, nor does it mean that a person who so believes is not well disposed to the good order and happiness of the United States.

3. A naturalization law which would deny citizenship to those who advocate or desire economic or political change would be unconstitutional.

ARGUMENT.

I.

Adherence to the Principles of the Constitution of the United States Has the Same Meaning for Those Who Seek to Become Citizens as for Those Who Are Citizens.

Citizenship in the first analysis is a privilege and not a right. The people of the United States in adopting a Constitution by which they agreed to be bound need not have allowed anyone to become citizens. However, they granted the power to Congress to establish a uniform rule on naturalization.[1] Congress need not have established a rule at all, but once having established such a rule,[2] ". . . there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established to receive the certificate. . . . In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor."[3]

It is true that, as with any other right, privilege or benefit granted by a government, any doubt is to be construed in favor of the government and against the party claiming the grant.[4] However, this construction must be a judicial one, in accord with judicial decisions. To overlook well established judicial principles is to abuse the discretion vested in a trial judge. Disagreement or even

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[1]U. S. Constitution, Art. 1, Sec. 8, cl. 4.

[2]Nationality Act of 1940, Sec. 307 (54 Stat. 1142, 8 U. S. C. 707).

[3]*Tutun v. United States*, 270 U. S. 568, 578 (1925).

[4]*United States v. Manzi*, 276 U. S. 463, 467 (1928); *Swan and Finch Company v. United States*, 190 U. S. 143, 146 (1903).

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hatred of views which an applicant for citizenship may hold or have at one time held is not the criterion for admission to citizenship. Justice Holmes in his dissent in the Schwimmer case stated:

> ". . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country."[5]

That view was expressly adopted by this Court in the *Girouard* case.[6]

Although the burden of proof is upon the applicant in proceedings instituted to obtain citizenship, and upon the government in revoking or cancelling a certificate of naturalization,[7] the test of allegiance to this government invoked in both instances is the same whatever the rule may be with respect to burden of proof. Logically, this must be the rule. To say that to be attached to the principles of the Constitution of the United States has one meaning for those who seek to become citizens, but a different meaning for those who at one time were granted citizenship is to establish the proposition that the principles of the Constitution may vary solely on the basis of who seeks to establish them—an applicant for citizenship or the government. Such could hardly have been the intention of the framers of the Constitution or of Congress

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[5]*United States v. Schwimmer*, 279 U. S. 644, 654-55 (1929).

[6]*Girouard v. United States*, 328 U. S. 61, 68 (1946).

[7]*Schneiderman v. United States*, 320 U. S. 118, 122 (1943); *Baumgartner v. United States*, 322 U. S. 665, 675 (1944).

in establishing a uniform rule on naturalization. Principles may change with the changing times, but not with the persons who seek to establish attachment to them.

While it is proper for a court and its duty before granting citizenship to an applicant to be vigilant in inquiring into the mental attitude of the applicant, that inquiry should be made with the view always in mind that the Constitution itself has throughout the history of the United States been subject to differing mental attitudes on the part of its citizens, its legislators, administrators and judiciary, and these often depend upon and are interpreted with the ever-changing economic conditions. Part of this inquiry concerns the good moral character of the applicant and knowledge of this country through residence and understanding of the general operation of its laws, for it is contemplated that admission to citizenship should be mutually beneficial to the government and the applicant. The fact that a showing with respect to residence and moral character and otherwise must be made in addition to showing attachment to the principles of the Constitution does not mean that this attachment means one thing for an alien seeking citizenship and another for a citizen.

The principles of the Constitution having the same meaning for all who seek to establish attachment to them, however the burden of proof may vary in a given case, it was error for the Circuit Court to hold that "Denaturalization cases and deportation cases cited by appellant are not in point here, for this is neither a denaturalization case nor a deportation case."[8]

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[8] *Wixman v. United States*, 167 F. 2d 808, 811 (1948).

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II.

A Belief in Collectivism Does Not Violate the Principles of the Constitution of the United States, Nor Does It Mean That a Person Who so Believes Is Not Well Disposed to the Good Order and Happiness of the United States.

Petitioner was denied citizenship in the United States, the country where, the evidence showed, he had lived since the age of 11, attended the public schools, high school, Yale University [R. 178] and the University of California, and served as a volunteer in the Army of the United States in World War I, the army of the country of which he considered himself a citizen from the time of a ceremony during such service. [R. 178.] This denial was based upon findings, with the correctness of which we are not here concerned as findings of fact, that the evidence showed that petitioner had "attitudes of collectivism" of which he was a "protagonist" [R. 290] and the conclusion of law was reached that because of being a "protagonist" of "attitudes of collectivism," his ideas were not "along the lines of constitutional make-up," but "along the lines of foreign or alien ideology." [R. 290.]

In its broadest sense, one who believes in "collectivism" is merely one who believes in doing things in a collective manner. Were there not people who believed in this principle, there would be no United States, no states, no counties, no cities, no towns, or no community enterprises of any sort. Our whole republican form of government is based upon a "collectivism" in one sense of the word.

In its narrower sense, a "collectivist" is one who is a member of a school of economic thought which accepts the theories of the socialists, but withholds approval from

revolutionary doctrines.[9] Socialism is a political and economic theory of social organization based on collective or governmental ownership and democratic management of the essential means of the production and distribution of goods.[10] This is not a foreign ideology in the United States. Many instances of government ownership and democratic management of the essential means of production of goods are evident in this country. To name but a few: T. V. A., Hoover Dam, the public school system, the Los Angeles Department of Water and Power, the United States Post Office, Fire Departments, Police, Forestry Service, the Veterans Administration. The recognition of corporations and of collective bargaining rights on the part of unions is a recognition of a degree of collectivism.

Capitalism may be defined as an economic system in which the ownership of land and natural wealth, the production, distribution and exchange of goods, and the operation of the system itself, are effected by private enterprise and control under competitive conditions.[11] Following such a definition, there has never been pure capitalism in this country. Only after New York and Virginia agreed to surrender their claims to Western lands would Maryland ratify the Articles of Confederation in 1781 and by her ratification was the new government established. This collectively held Northwest was a common bond of union for all the states—held by the federal government, not by

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[9]Webster's New International Dictionary of the English Language, Second Edition Unabridged, 1940. See also: Walton H. Hamilton, Collectivism, Encyclopaedia of Social Sciences, Vol. III, 1930.

[10]*Ibid.*

[11]*Ibid.*

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private individuals.[12] Partial control of the economic system was early taken over by our government in the form of protective tariffs and a national monetary system. Instance after instance may be given of governmental control and some of the ownership of land and of natural wealth, the production, distribution and exchange of goods and the operation of the system itself—governmental operation of the railroads during the first World War, the F. H. A., the A. A. A., the Federal Communications Act, tideland oil, to name but a few. Whether we are or ever have been either a capitalist nation or a collectivist nation is only a matter of degree. Because of this, a person who believes in and advocates capitalism in its pure sense shows as little "steadfast adherence to the processes under which we live and under which a country has been built" [R. 286], as one who believes in collectivism in its pure sense. It is but a matter of degree. As our country has grown great on this combination of both capitalism and collectivism, neither belief is entirely foreign to our way of life, and one who sincerely believes that the country which he wants to make his own may grow greater under one theory or the other and wants to work toward that end through democratic processes is well disposed to the good order and happiness of the United States.

Great weight was given by the District Court in denying citizenship to petitioner to a speech which petitioner made in 1934 or 1935. The Court took judicial notice that this was made during the depression when "the environment was distressful, there was unemployment, people were needy, there were hunger strikes and there were all

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[12]Faulkner, Harold Underwood and Tyler Kepner, *America, Its History and People*, Harper and Bros. 1934, p. 111.

sorts of disorders caused by the distress of those days." [R. 284.] The depression was a time for change and whatever suggestions were made for improvement were welcome. Petitioner in this speech spoke of his love and loyalty to the United States and gave a picture of the United States which he would like to see, "a land of plenty, one, the resources of which were sufficient to wipe out needs, hardships, and poverty for all honestly willing to work; a land in which co-operation and social-mindedness could create all necessities for all." [R. 282.] Petitioner then continued to express his views on the role of a lecturer, teacher or writer as being a person who after careful investigations is bound to reach fairly definite conclusions, that the audience, students and readers are entitled to know these conclusions and from the expression of conclusions definitely formulated, the listener or reader is forced into agreement or disagreement with the author which helps develop logical arguments in support of a stand and in turn defense or attack by those who take an opposing stand, which result in clashes of conflicting ideas, development, growth which is the core of knowledge and "the very life-blood of education." [R. 283.] Petitioner then discussed the system of capitalism, concluding that it failed to "provide the essentials for the system which it hopes will keep alive" [R. 285]; state capitalism, for which he could not build up much of a case [R. 286]; fascism, of which he was critical [R. 200]; and the collectivist state, concluding "that progress, human well-being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialism." [R. 289.] If we assume that petitioner had reached the conclusions expressed, and that he did not merely express them to arouse stimulating thought on the part of his

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listeners, then as an economist in a time of economic crisis, he was performing the duty cast upon all persons, using his special knowledge and training to attempt to find a solution to that crisis, his judgments having in view a "worth-while standard of living for every man, woman and child." [R. 289.] A conclusion by the trial court that no one can find "cause for joy, or happiness, or peace and contentment, for good order to any people, in that lecture" [R. 289] is to conclude that though on its face, the solution was presented for "progress, human well-being-civilization in brief" and the analysis of economic systems based on the end "of a worthwhile standard of living for every man, woman and child under it," such a person cannot have the well being of people or his country at heart if he criticizes or reaches conclusions not in accord with the *status quo*, or capitalism or state capitalism, assumed to be tied in with the "processes under the Constitution." [R. 286.] To reach such a conclusion is to cast doubt upon fundamental democratic principles, under which the policies under which people live are thought to be best formulated by the interaction of pressure groups and where the majority rules without tyrany or oppression because the minority is at all times free to express its criticisms and to win a new majority if its persuasion finds acceptance in the free market place of ideas.

The economic system in which petitioner once presumably believed and for which belief he has now been denied citizenship is a belief upheld by many of our citizens. It is a system recently adopted in part by the great common law nation, England. There it has been found to be an adaptation fully in accord with the English constitutional principles upon which most of the United States are based. The present majority in the United States may think it a

poor system, and unwise for the English people to adopt such a system, and not want to adopt the same economic system in this country, but that does not mean that the system is not in accord with our basic Constitutional principles or that an advocate or believer in such a system is not well disposed to the good order and happiness of the United States. There is a minority party within this country, many of whom have been elected to office, that believes in the same economic system. In *Girouard v. United States,*[13] this Court discussed the fact that no religious test is allowed for holders of public office and in relation to citizenship stated: "There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs."[14] So here, if a "collectivist" may run for president, be a member of Congress, or a Governor of a state or a mayor of a town, or other public official, there is no indication that Congress intended that a stricter standard be applied to applicants for citizenship.

To allow the interpretation of the Nationality Act by the District and the Circuit Courts in this instance to stand is to deny the validity of the democratic process. To raise by oral or written discussion, or to produce debate in matters essential to our government, certainly cannot be held to be opposed to our Constitution, for, in fact, our culture looks with pride and esteem upon those who encourage controversy in thought, since only by that means can we better and improve the good and welfare of our people.

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[13]*Girouard v. United States,* 328 U. S. 61 (1946).

[14]*Ibid.,* pp. 65-66.

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III.

A Naturalization Law Which Would Deny Citizenship to Those Who Advocate or Desire Economic or Political Change Would Be Unconstitutional.

Citizenship is a privilege which Congress may grant on such conditions as it sees fit. However, its power in that respect is not unlimited;

> ". . . one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the constitution of the United States may thus be manipulated out of existence."[15]

The advocacy of political and economic change is an exercise of the right of free speech which they may not be curbed without the showing of a clear and present danger.[16] The guarantee of free speech extends to aliens as well as to citizens.[17] As an alien has this right to advocate economic and political change, he may not be required to give up this right or to have never exercised it to become a citizen. Other conditions Congress may and has set for the granting of the privilege of citizenship. The applicant must show that during all the periods of time re-

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[15]*Frost and Frost Trucking Company v. Railroad Commission of California*, 271 U. S. 583, 592 (1926).

[16]*Thornhill v. Alabama*, 310 U. S. 88, 104-105 (1940); *Bridges v. California*, 314 U. S. 252, 263 (1941); *Schneiderman v. United States*, 320 U. S. 118, 157-158 (1943); *Thomas v. Collins*, 323 U. S. 516, 530 (1945).

[17]*Hague v. C. I. O.*, 307 U. S. 496, 519 (1939); *Bridges v. Wixon*, 326 U. S. 135, 148 (1945).

quired for residence he has been and still is of good moral character. The petitioner in the instant case met this burden. The applicant must show also that he is well disposed to the good order and happiness of the United States and attached to the principles of the Constitution. The District Court found that petitioner was at one time at least not so disposed. This finding was not disturbed by the Circuit Court. A wide discretion is lodged in the Court that hears a petition for naturalization, however, this is and must be a judicial discretion.[18] To rule that merely because one advocated change he is not well disposed to the good order and happiness of the United States or attached to the principles of the Constitution is not a judicial determination. Constructive criticism is encouraged by our general system of government, and the value and sincerity of this criticism should not be judged by conformity to prevailing thought.[19]

During the course of debate on the Nationality Act of 1940 in Congress, Representative Rees, Chairman of the Subcommittee of the Committee of Immigration and Naturalization, House of Representatives, which worked on the bill stated:

> ". . . Under this bill, we believe we have covered the question of fascism, nazi-ism, communism, or any other 'ism', although they are not specifically mentioned by name. Provision is made for careful investigation into the applicant's attitude in these matters, both at the time he files his declaration and when he takes out his final papers."

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[18]*Tutun v. United States,* 270 U. S. 568, 578 (1925).

[19]*Schneiderman v. United States,* 320 U. S. 118, 137-138 (1943).

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Representative Norrell: "In other words, if he is that kind of person to begin with, he cannot become naturalized?" Representative Rees: "The gentleman is right." Representative Norrell: "And if he gets that way afterward, I assume the bill contains provisions whereby the naturalization may be revoked." Representative Rees: "It is my opinion that it would be."[20]

If, as may be inferred from this portion and other parts of the Congressional debate on the Nationality Act of 1940, the intent of Congress was to have the provisions of the Act exclude from citizenship in the first instance or to provide for the expulsion from citizenship of all who advocated economic or political change in any form in the United States, such provisions in the light of the history and the purposes and aims of the founders of the United States and its Constitution would be unconstitutional. The United States can and has existed only with constant improvement. One who sincerely seeks to improve it by Constitutional means is of great benefit to the nation.

Conclusion.

The rights here involved are basic to the growth and welfare of our country. If only those who agree with "prevailing" economic and political thought in this country may become citizens, our future growth and development as a nation will be seriously hampered. Democracy itself is based upon the interaction of pressure groups. To favor one group over another by grants of privileges to one and not to another is to undermine the whole democratic system. The principles of the Constitution have the same meaning for all, citizen or alien.

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[20]Congressional Record, Vol. 89, Part 11, p. 11949.

Wherefore, the petition for a writ of certiora
be granted and the case remanded with directions
petitioner's application for naturalization.

Respectfully submitted,

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